St. Joseph's Hospital *and* New York State Nurses Association. Case 3-CA-11364

3 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 26 September 1983 Administrative Law Judge Winifred D. Morio issued the attached decision. The Respondent filed exceptions and a supporting brief, and both the General Counsel and the Charging Party filed answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, St. Joseph's Hospital, Elmira, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Furnish the Union, on request and within a reasonable time, the financial information and records relevant to Respondent's claim advanced in November 1982 that it was unable to pay a wage increase."

2. Substitute the attached notice for that of the administrative law judge.

[1] We deny the Respondent's motion to reopen the record. The execution of a collective-bargaining agreement between the parties does not moot the need to remedy an unlawful refusal to produce information during negotiations for an agreement. E.g., *Latimer Bros.*, 242 NLRB 50, 52-53 (1979). We will, however, modify the recommended Order and notice language to specify that the Union have access only to information requested during negotiations.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with New York State Nurses Association (the Union) by denying the Union's request for an examination of our financial books and records by a representative designated by the Union to investigate our claim of an inability to pay a wage increase.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union, on request and within a reasonable time, the financial information and records relevant to our claim advanced in November 1982 that we were unable to pay a wage increase.

ST. JOSEPH'S HOSPITAL

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge. This case was tried before me on May 26, 1983, in Elmira, New York, pursuant to a complaint issued by the Regional Director for Region 3 on January 17, 1983. The complaint, based on a charge filed by New York State Nurses Association (Association/Union) against St. Joseph's Hospital (Respondent/Hospital) alleges, in substance, that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to permit an examination of its financial records, although it claimed an inability to pay a wage increase. The answer, basically, denies the commission of the alleged unfair labor practices.

All parties were given a full opportunity to participate in the proceedings, to cross-examine witnesses, to argue orally and to file briefs. Briefs were filed by all parties.

Based on the entire record in the case and my observation of the demeanor of the witnesses and after careful consideration, I make the following

FINDINGS OF FACTS

I. JURISDICTION

St. Joseph's Hospital (Respondent/Hospital), a New York corporation with its principal office and place of business in Elmira, New York, is engaged in the business of providing health care services on an in-patient and out-patient basis. During the past year, a representative period, Respondent, in the course and conduct of its business operations, received gross revenues in excess of $250,000 and during the same period of time purchased and received goods and materials valued in excess of $10,000, which goods and materials were shipped directly to Respondent from points located outside the State of New York. The parties admit, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sec-

tion 2(6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION

The parties admit, and I find, that New York State Nurses Association (the Association) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Union has been the collective-bargaining representative for the register nurses at the Hospital since 1972. During the years the parties have executed a series a collective-bargaining agreements, the most recent one, at the time of the events in this case, was effective from January 1 to December 31, 1982. On November 2, 1982, the parties met to begin negotiations for a new contract. The Union's chief representative was Bart Minsky and the Hospital's chief representative was Susan S. Robfogel.[1] The Union presented its proposals and the parties agreed to meet on November 12, 1982. The second meeting was held as scheduled with Minsky and Robfogel continuing in their roles as chief representative for their respective party. During this meeting, the administrator for the Hospital, Sister Martha Gersbach announced that the Hospital faced a serious financial problem due to the insufficient reimbursement funds received from New York State. She then outlined a 10-point cost-reduction program which was to be implemented in 1983. Sister Martha also stated that the Hospital would review its financial situation on a monthly basis and would grant pay increases when it was possible to do so.[2] Minsky questioned Robfogel as to whether the Hospital was claiming an inability to pay and Robfogel replied that that was the situation. Robfogel also stated that since the Hospital was claiming an inability to pay, it realized it had to permit the Association to examine its financial records. Kenneth Emery, the Hospital's director of human resources, testified that Robfogel stated that the Hospital would permit a mutally agreeable qualified public accountant to check its records to verify Respondent's financial condition. According to Emery, the Hospital's representatives explained that the individual selected by the Association should be someone who had a working knowledge of and experience with the New York State reimbursement system and "who would be knowledgeable about the new law as well as the old law regarding the reimbursement system." At this point the Association's representatives had not indicated that they would seek to examine the Hospital's records nor had they proposed any individual to conduct an examination. Emery testified that the Hospital did not question the right of the Association to examine its records, that was not the issue. The Hospital's only concern, according to Emery, was that the individual selected by the Association "be mutually agreeable and qualified" and it was the individual's qualifications that was of paramount importance.

On November 13, 1982, Robfogel wrote to Minsky outlining the criteria the Hospital considered necessary for any CPA selected by the Association to have before the Hospital would permit an examination of its records. The criteria set forth in the letter were as follows:

1. Must be a member of AICPA.
2. Must be a member of the New York State Society of CPA's.
3. Must be a participating CPA in New York State with the following qualifications:

(a) A minimum of five years audit experience at the management level.
(b) A minimum of two of the preceding five years with management audit engagement responsibilities for voluntary community hospitals in New York State with a least 150 beds.
(c) Demonstrated knowledge of the New York State Hospital Reimbursement Regulations during the period 1978–1982.
(d) Demonstrated knowledge of the Lombardi Legislation (S526-D; A7303-B) and how rates will be calculated.
(e) References of hospital clients.

Robfogel concluded the letter with the statement that she awaited proof that the CPA selected by the Association met the criteria outlined above. On November 17, 1982, Minsky wrote to Emery requesting specific records and setting December 10, 1982, as the date the material should be available for an examination by the Association's representative, William J. Odendahl Jr., a certified public accountant. The records requested were the following:[3]

1. A copy of the annual audit report for the 3 most recent years, including:

(a) Statement of Earnings for the years ended;
(b) Statement of Financial Position (Balance Sheet) as of the years ends;
(c) Statement of Equity for years ended;
(d) Statement of Fund Flows (Cash Flows) for years ended;
(e) Notes to financial statements and auditors' opinion letter.

2. Copies of internal financial operations, including all statements listed as items 1 (a), (b), (c), (d), and (e) for the current period to date and projected for the full year and at the yearend.

3. Reimbursement rates from all third party payers for the previous 3 years and the current year.

4. Bed census on a monthly basis for the previous 3 years and the current year.

5. Copies of the Institution Cost Reports and Statistical Reports filed with New York State for the 3 most recent years.

6. Copies of tax returns filed for the 3 most recent years.

[1] Robfogel is counsel to the Hospital.

[2] The administrator was not part of the Hospital's negotiating team.

[3] The records considered necessary were based on Odendahl's suggestions.

7. Copies of Annual Charities Report for the 3 most recent years.

Robfogel, on November 24, 1982, forwarded another letter to Minsky wherein she stated that the suggested date for the examination of the records was agreeable, although if an earlier date was possible that would be preferable. The letter also stated the following:

> In accord with my letter to you of November 13, 1982 the Hospital will expect to receive proof that Mr. Odendahl meet the criteria spelled out in that letter prior to his arrival at the Hospital. If you disagree with the reasonableness of any of those criteria, please let me know that immediately.

Minsky, on December 1, 1982, advised Robfogel that in absence of Odendahl's report the Association was canceling the bargaining sessions which had been set for December 9 and 10, 1982. In addition, Minsky informed Robfogel that the Association considered Odendahl "eminently qualified and fully authorized to act as the Association's reprentative." Minsky also advised Robfogel that the Association was prepared to discuss any question the Hospital representatives might have regarding Odendahl's analysis of the records when Odendahl completed his audit. On December 6, 1982, Robfogel sent a mailgram to Minsky reiterating the Hospital's position that the CPA selected by the Association meet the previously outlined criteria and stating that the Hospital would be willing to discuss any of the criteria the Association considered unreasonable. The mailgram also contained the following statement, "If it would be helpful to you, any of the big eight national accounting firms would be acceptable to the hospital." On December 1982, Robfogel wrote to Minsky urging him to contact her concerning the scheduling of new bargaining sessions. Thereafter, the parties met on January 17, 1983, and Minsky informed Robfogel that it was the Association's right to choose its representative and he stated that he rejected all the criteria set by the Hospital on the ground that they were unreasonable.

Emery testified that during this meeting on January 17, 1983, Robfogel expressed her concern that if the Association utilized someone to examine the records who was unfamiliar with the State's reimbursement system, a report could issue, which did not represent the Hospital's true financial picture and this could cause problems with the employees in the bargaining unit. Minsky testified that at this meeting Robfogel also stated that an inaccurate report could set off a volatile situation.

In January 1983 Minsky terminated his employment with the Association. On January 28, 1983, Robfogel forwarded a letter to Richard J. Silber, counsel for the Association, in which she set forth the background facts and again stated that the Hospital did not question the Association's right to examine the Hospital's records but insisted, "that the independent CPA be someone with demonstrated knowledge of the New York State hospital reimbursement mechanism and in particular the new Medicare Waiver." Robfogel explained that the Hospital's inability to pay was "inextricably" tied to and a direct result of the New York State reimbursement system and the new Medicare waiver and it was, therefore, necessary to have someone with knowledge in the area. She expressed here willingness to discuss any of the criteria set forth in her earlier letter.

On March 18, 1983, Silbers replied that the Association considered that Odendahl possessed the necessary experience and competence to audit hospital records and that if the Hospital disagreed with his findings they could challenge them. Robfogel replied on April 21, 1983, that the CPA selected by the Association should be able to advise the Hospital of how he derived his knowledge of Medicare, Medicaid, and charge control as they apply in New York State; what experience he had in analyzing financial statements in the health care industry and outline the New York State health care provided for whom he had provided professional services, the dates of the services performed and the scope of the services. Robfogel also stated that all other criteria set forth in her letter of November 13, 1982, should be ignored.

Respondent witnesses testified that New York State, by virtue of its reimbursement system and certain regulations and legislation, exerts extensive control over the Hospital's revenue. Due to this control Respondent contends that a proper assessment of its financial records can only be made by a CPA with a demonstrated knowledge in the area of the New York State reimbursement system. In support of its position Respondent called as an expert witness, Gerald J. Rotenberg.

Rotenberg, a certified public accountant, testified that his firm, consisting of about 24 to 25 professional employees, provides broad-based accounting services for its clients. The firm includes among its clients, approximately 22 health care institutions, 20 of these institutions are located in New York State. It was Rotenberg's opinion that auditors who examine records in order to verify an employer's claim of an inability to pay investigate the situation in two stages. The first stage involves an examination to ascertain whether the records of the employer were proper and accurate; whether they were kept in accordance with sound accounting principles, and whether the requisite submissions made to various Government agencies were correct. Rotenberg testified that any certified public accountant would be competent to perform this type of examination. However, when an auditor seeks to verify an employer's claim of inability to pay, Rotenberg stated that "a single day's snapshot of the financial condition of the company does not give you what you are looking for." It is the next level of investigation that is the crucial one. At this level, according to Rotenberg, the auditor seeks to evaluate the employer's future operations and "the rules and regulations that govern us as an auditor, no longer govern us as analysts of future data." Rotenberg stated that in order to analyze records of an employer to determine the prospective picture, a CPA must have practical experience in the field. This is particularly true, he claimed, when the records being examined are those of an industry subject to Government regulations, such as public utility companies, the insurance companies, and institutions in the health care field.

In the health care field Government regulations control the reimbursement procedure. In New York State, contrary to the prior Federal system of reimbursement and the system that exists in many States, the reimbursement system is based on the concept of prospective reimbursement rather than retroactive reimbursement. In his prospective reimbursement system the state predetermines the rate the health care institution will receive.[4] Rates are based by the State on the costs incurred by the institution in prior years and then are adjusted by a trend factor to allow for inflation.[5] The Hospital's costs are divided into various categories and each category can be affected by a different trend factor. Rotenberg claimed that an auditor, in order to evaluate the Hospital's projections, must be knowledgeable about the trend factors and be able to anticipate how those factors can change. In addition, the rates set by the State usually are appealed by the health care provider and an in-depth knowledge of this appeal process is necessary if the appeal is to be successful.

In Rotenberg's opinion, in order for a CPA to adequately understand the complexities of the reimbursement system in the health care field, the CPA should be knowledgeable about statistics and economics, the New York State Health Department Code (part 86), the Medicare Manual relating to cost reimbursement, the New York State Health Department regulations and memoranda, the Social Services' regulations and memoranda, the Blue Cross/Blue Shield reimbursement system, the Charge Control System in the State of New York, and the 1983 Medicare waiver. Rotenberg was doubtful that a CPA, unfamiliar with the health care field, could gain the requisite knowledge from reading the laws and regulations in the particular areas set forth above. In his opinion, knowledge could be gained only from working with the system, he was unaware of courses offered by schools on this subject matter. He also stated that a CPA who had worked for a governmental agency in the health care field or for one of the major accounting firms with basic operations in New York might have the necessary expertise.

On cross-examination Rotenberg testified that all CPA's are eligible for membership in the American Institute of Certified Public Accountants (AICPA) and any CPA certified by the State of New York could join the New York Society of CPAs. He did not consider management auditing experience as a necessary criteria for an auditor to have in order to verify an employer's claim of an inability to pay. While he personally could not conceive of anyone being able to comprehend the reimbursement system through research and reading only, he would not say that it could not be done. Rotenberg stated that an individual could demonstrate his knowledge of the reimbursement system by identifying the clients he worked with, the type of work he performed, responding to independent questioning as to his knowledge of the system, or by reference to third party sources, such as other accountants, attorneys, or health department officials. However, he admitted that under the professional standards of AICPA, a CPA should not reveal the name of the client for whom he has performed services without the client's permission. He stated that he was unaware if there was a prohibition on revealing to third parties the nature of the services an auditor performed for a client, but he considered it "highly unethical" to do so unless the service related to a normal accounting or auditing function. He recognized that under the AICPA code a CPA should not undertake an assignment unless he was of the opinion that he could competently perform the work. Rotenberg further testified that AICPA does not recognize any field of specialities.

Rotenberg stated that until some weeks prior to the hearing the Hospital had not requested his opinion about the criteria necessary for a CPA to properly perform an examination of the records of an employer in the health care field who claimed an inability to pay. He was unaware of how the Hospital's representatives determined the criteria they required the Association's auditors to have before they would permit an examination of their financial records. He stated that the request set forth in the April 23 letter was more complex than necessary, although he thought the request was a reasonable one. However, he also testified that an in-depth examination under points two and three of that letter would be embarrassing, if not impossible.

Rotenberg admitted that a competent CPA would be able to determine if there was in fact an inability to pay, if he had the information given by the state to the employer, and additional information given by the employer to the accountant. However, while admitting that fact Rotenberg stressed that this would be true only if the rate set by the State was accepted by the employer as the correct rate and this rarely occurred. Employers usually appeal the rate set by the State and the CPA would need to be familiar with the appeal process to determine whether the appeal would be successful. Further, in those situations where the rate had not been set by the State, the CPA would be unable to make any computations because the starting base for his computations was the rate. In the absence of this set rate a CPA would need to reconstruct a rate and to do this he would have to have the type of knowledge which could be gained only by working in the area of the reimbursement system in the health care field.

IV. DISCUSSION

It is undisputed that at the commencement of negotiations the Hospital through its representative, Robfogel, claimed that it was unable to offer a wage increase due to its financial situation. Robfogel also stated at the same time that the Hospital recognized that it was legally obligated to permit an examination of its financial records by the Union. That such an obligation exists is well settled.[6]

[4] In the retroactive reimbursement system the health care provider submits its actual costs for reimbursement and the Federal or state government will pay the actual costs.

[5] Roger Burns, the Hospital's director of fiscal services, testified that the initial rates set for Medicaid and Medicare came out in November 1982. However, the final rates for Medicaid were set in either December 1982 or January 1983 while the final rate for Medicare was not available until March 27, 1983.

[6] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149.

However, notwithstanding its recognition of this obligation the Hospital placed restrictions on the Union's access to their financial records. The restrictions did not relate to the records, the Hospital did not refuse to disclose any particular record or records because they were confidential or were related to trade secrets. Nor did the Hospital contend that it would be burdensome to produce the records. As Respondent stated, "No evidence was introduced at the hearing to show that the Hospital placed any restrictions whatsoever on the information the CPA could review or communicate to Association representatives." The issue, therefore, is not whether Respondent violated the Act by refusing to disclose its records because they were confidential, contained trade secrets, or because it would be burdensome to produce them. The issue is whether the Hospital can require the Union's representative to meet certain criteria, determined by it, before permitting the representative selected by the Association to examine admittedly relevant material.

Respondent contends that it has the right to require the Union's representative to meet its qualifications before permitting an examination of its books. In support of this position it cites both Supreme Court decisions and Board cases in which it claims that the Court and the Board have recognized instances when an employer was entitled to make a conditional offer of disclosure, although the employer had claimed an inability to pay a wage increase. Such a situation exists in the present case, according to Respondent.

Further, the Respondent argues that the qualifications it required the Association's representative to possess were not "per se" unreasonable and it was willing to discuss, with the union representatives, any changes in the requested criteria. Finally, Respondent argues that the record discloses that Respondent acted in good faith in requiring the Union's representative to meet certain criteria and, therefore, it cannot be found to have violated the Act.

Counsel for the General Counsel and the Charging Party argue that the Hospital cannot place restrictions on the right of the Union to select a representative of its choice. Moreover, they maintain that the qualifications required by Respondent before it will permit an examination of its records are unreasonable on their face and establish that Respondent is bargaining in bad faith.

Section 7 of the Act states as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively *through representatives of their own choosing*. [Emphasis added.]

The language cited above demonstrates that Congress believed that effective collective bargaining could be conducted only if employees were free to choose their own representative. The instant case arose in the context of collective bargaining and the employees, through their union representative, designated a certified public accountant considered by them to be "eminently qualified" to conduct, on their behalf, an examination of Respondent's records. Respondent, however, was concerned that this representative, although a certified public accountant, would not arrive at the same conclusion that their representative had arrived at and they, therefore, refused to permit their books and records to be examined. In effect, Respondent wants to sit on both sides of the bargaining table. The type of control which Respondent seeks to exercise over the Union's representative is in conflict with the purposes of Congress as set forth in Section 7 of the Act.

In *Oates Bros., Inc.*, 135 NLRB 1295, 1297 (1962), an employer insisted that the steward selected by the union be subject to its approval. The Board, in finding that such insistence constituted a violation stated, "It is well established that, in the absence of special circumstances, an employer does not have a right of choice either affirmative or negative as to who is to represent employees for any of the purposes of collective bargaining." Similarly, in *Sears, Roebuck & Co.*, 139 NLRB 471, 475 (1962), when a company refused to meet with the representative chosen by the union because of its belief that he would inject national issues into local bargaining, the Board adopted the Trial Examiner's position that an employer could not dictate to a labor organization the choice of its representative. The concept that the Union is entitled to choose its representative was stated again in *Proctor & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978). Thus, the administrative law judge, with Board approval, stated, "It is the Union which is entitled to the information and for the Union, not the Respondent, to decide who in its organization is to receive the documents, who is to be consulted and who is to decide whether to take the grievance to arbitration."

The Board did not find that the company violated the act when it refused to bargain with the union's representative in *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980). However, in that case the Board based its decision on the fact that the union representative in question previously had engaged in misconduct. The Board, in *Fitzsimmons*, did state, however, the following, "It is well established that each party to a collective-bargaining relationship has both the right to select its own representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party." In *Winona Industries*, 257 NLRB 695, 698 (1981), the Board also found a violation of Section 8(a)(5) and (1) of the Act when a company refused to allow an inplant inspection by an industrial hygienist designated by the Union. Thus, both the language of the Act and Board decisions establish that the selection of the union representative is an internal matter, over which an employer, generally, has no control.[7]

Respondent argues, however, as noted, that Supreme Court decisions and Board law recognize that there are situations when a union's interest in arguably relevant information must give way to other legitimate interests. The majority of the cases cited by Respondent in support of its proposition deal with circumstances where an employer has refused to disclose material because it was confidential, involved trade secrets, or would be burden-

[7] *Howland Hook Marine Terminal Corp.*, 263 NLRB 453, 454 (1982).

some to produce. The Courts and the Board always have been concerned with balancing the Section 7 rights of employees to have relevant information with the legitimate concerns of employers that the production of such information would be detrimental. We are not dealing with that type of legitimate concern in the instant case. Here, Respondent refused to permit the examination of its records because it claims that an individual not versed in the New York State reimbursement system might reach incorrect conclusions as to the financial health of the Hospital and such erroneous conclusions could seriously damage collective-bargaining process. The difficulty with this argument is that the record fails to disclose evidence to support it. It is true that at several points during the hearing counsel for Respondent expressed such a concern and a Respondent witness attributed such remarks to respondent counsel during the January 1983 negotiation session. However, other than these comments this record fails to disclose what impact, if any, there would have been on the negotiations if Union's representative reached conclusions different from those reached by respondent representatives. Further, the record fails to disclose that the Union refused to discuss with Respondent whatever conclusions Odendahl might arrive at prior to the disclosure of this information to bargaining unit employees. In fact, the Union's letter of December 1982 stated that the Union was prepared to discuss any question the Hospital representative might have regarding Odendahl's report when he completed his audit. There is no evidence in this record to warrant the conclusion that the Union was prepared to act recklessly, or without affording the Respondent an opportunity to explain the differences, if any in fact existed, before communication with unit employees. Nor does the record establish that the registered nurses involved herein were prepared to act recklessly.

However, assuming that both of the problems envisaged by Respondent were to occurr, i.e., that Odendahl would reach erroneous conclusions and this would hamper the collective-bargaining process, this record does not establish that the criteria set by Respondent in its letter of November 13, 1982, were reasonable. In the first instance, it should be noted that Respondent, failed to establish how it arrived at the criteria it set forth in its letter of November 13, 1982.[8] Rotenberg, Respondent's witness, testified that he was not approached by Respondent about what qualifications were necessary until a few weeks before the hearing.

In *Yakima Frozen Foods*, 130 NLRB 1269 (1961), cited by Respondent, the employer claimed an inability to pay and offered to disclose its records under certain conditions. The Board in that case stated the issue to be whether an employer violates the Act when it refuses to permit a union to make a *general* inspection of its books and records and by insisting instead that the books and records be audited by a *qualified accountant not in the union's employ*. The Board stated that it did not find these criteria to be unduly restrictive. In this case the Union did not seek a general inspection of the Hospital's books but outlined the specific documents it sought to examine. Moreover, the Union stated that it was prepared to have Respondent's financial records examined by a certified public accountant, not in its employ. Thus, the Union has met the criteria found permissible in *Yakima*. In *Manitowoc Co.*, 186 NLRB 994, 1006 (1970), the Board found that the employer did not violate the Act when it stated that it would permit an examination of its books by an independent accountant after a casual request by the union for such an examination. However, it should be noted that the trial examiner was not faced there with an admitted claim of inability to pay. Thus, he stated, "Assuming *arguendo* that the Respondent's position with respect to its economic conditions was such that it had the legal obligation to supply financial data upon appropiate request, I find that its action in this regard fulfilled that obligation." In this case, there is an admitted claim of inability to pay and the Union has offered to have the books examined by an independent accountant.

Respondent, however, was not satisfied with the Union's representative, although he was an independent certified public accountant. It sought additional qualifications which it contends were necessary before its records could be examined. The fact that these additional qualifications were unnecessary is demonstrated by Respondent's own actions. In April 1983 after the parties had been at odds over the issue for several months Respondent abandoned the criteria set out in its letter of November 1982. More specifically, Respondent, in its April 1983 letter, advised the Union that it could "ignore" the various criteria contained in the November 1982 letter.[9] It is extremely unlikely that the Respondent would have stated that the criteria could be "ignored" if, in fact, they had been necessary in the first place.[10] Further, with respect to the actual criteria contained in the November 1982 letter, Rotenberg testified that all CPAs are eligible for membership in the AICPA and that any CPA certified by the State of New York can join the New York Society of CPAs. He also testified that he did not consider management auditing experience a necessary qualification for an auditor to possess in order to verify an employer's claim of an inability to pay. He further testified that while he considered practical experience in the reimbursement field to be the best method to secure the necessary knowledge to audit the Hospital's financial records, he would not say that such knowledge could not be gained by research and reading. Basically, Rotenberg did not believe that a CPA should reveal the name of the clients for whom he provided services without the clients' authorization, nor did he believe that the nature

[8] The record does not disclose whether the Respondent's representative who made the decision about the institution's inability to pay possessed any of the criteria Respondent sought to impose on the Union's representative.

[9] It is unclear whether the retention of Rotenberg had an impact on this decision.

[10] Moreover, the possession of the criteria set forth in the November 1982 letter was not a guarantee that future predication made by the possessor of such qualifications would be accurate. Assuming that the Respondent's representative who made the decision, about the inability to pay, possessed the criteria, the record reveals that his predications were not correct. In May 1983 the Respondent offered a pay increase, notwithstanding the earlier predictions.

of service performed should be disclosed, unless the service was of a routine type. Rotenberg acknowledged that under the code of AICPA a CPA was not to undertake an assignment unless he was of the opinion that he could perform the work competently. In sum, many of the qualifications contained in the November 1982 letter, according to Rotenberg, were either not necessary or required the disclosure of information that could not be disclosed. It should be noted that the criteria Rotenberg thought necessary for a proper audit of the Hospital's books and records were not the same, in many respects, as those contained in the November 1982 letter.

With respect to the revised criteria in the April 1983 letter Rotenberg described the request as more complex than necessary, although not unreasonable. He also termed the request for the disclosure of the basis of the auditor's knowledge as requiring information that was embarrassing, if not impossible to produce.

The statute and Board decisions make clear that the selection of a representative is a matter within the control of the Union, absent unusual circumstances. I do not find such circumstances present in the instant case. Further, assuming that circumstances did exist which would permit the Respondent to impose certain conditions before permitting an examination of its books, it is evident from Respondent's conduct and the testimony of its witnesses that the criteria contained in the November 1982 letter and the April 1983 were neither necessary nor reasonable. In these circumstances, I find that Respondent by denying the Union's request for an examination of its books and records by the certified public accountant selected by the Union has bargained in bad faith and has violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has refused to bargain in good faith and has violated Section 8(a)(5) and (1) of the Act by refusing to permit the Union's representative an opportunity to examine its books and records although it has claimed an inability to pay a wage increase.
4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. I also recommend that Respondent be ordered to take certain affirmative action necessary to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, St. Joseph's Hospital, Elmira, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with new York State Nurses Association (Union) by denying the Union's request for an examination of the Hospital's financial books and records by a representative designated by the Union to investigate the claim of an inability to pay a wage increase.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) On request, permit an exmaination of its financial books and records by the Union's representative.

(b) Post at the Hospital, Elmira, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."